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HAWAII CIVIL RIGHTS COMMISSION

STATE OF HAWAII

WILLIAM D. HOSHIJO, Executive)	Docket No. 99-001-H-D
Director, on behalf of the)	
complaint filed by JERRY and)	FINAL DECISION AND ORDER
MOANA P. RAMOS,)	
)	
vs.)	
)	
BERETANIA HALE, LTD. and MARY)	
MAU LE CAVELIER,)	
)	
Respondents.)	
)	
)	

FINAL DECISION AND ORDER

The Commission heard oral argument on February 11, 2000, at 2:30 p.m. Present were Commissioners Harry Yee, Jack Law, Faye Kennedy, Allicyn Hikida Tasaka, and June Motokawa. The case in support of the complaint was presented by Enforcement Attorney Paul Nahoia Lucas representing the Executive Director William D. Hoshijo, who was present. Respondents Beretania Hale, Ltd., and Mary Mau Le Cavelier were represented by Robert Nip. Complainant Moana Ramos and Respondent Mary Mau Le Cavelier were also present. The Commissioners considered the parties' exceptions and statements in support, heard the oral argument, and considered portions of the record cited by the parties.

I hereby certify that this is a true and
correct copy of the original on file at the
HAWAII CIVIL RIGHTS COMMISSION.


CHIEF COUNSEL

I. RESPONDENTS' MOTION TO STRIKE EXECUTIVE DIRECTOR'S STATEMENT IN SUPPORT

The Executive Director filed Exceptions to the Hearings Examiner's Proposed Findings of Fact, Conclusions of Law and Recommended Order (Recommended Decision). Respondents did not file Exceptions. The Executive Director and Respondents both filed Statements in Support of the Recommended Decision. Respondents have moved to strike the Executive Director's Statement in Support because it was not filed in response to any Statement in Support and contained additional legal argument taking exception to the Recommended Decision.

H.A.R. § 12-46-54 provides, after the receipt of the written exceptions, "any party may file ... a statement in support of the written decision[.]" A statement in support is designed to respond to a party's exceptions in order to present both sides of the disputed factual or legal issues to help the Commissioners make the Final Decision. See, Tseu v. Volcano Island Farms, Inc., at 2 n. 1, Docket No. 94-003-E-R (February 8, 1995) ("Statement in Support provide[s] an opportunity to respond to the other party's Exceptions.") However, in Tseu v. Simich, at 2-3, Docket No. 95-012-E-SH (October 29, 1996), the Commission authorized the Hearings Examiner to accept for filing a Statement in Support even if the opposing party did not file Exceptions but recognized the right of the opposing party to file a motion to strike for good cause. A Statement in Support should not contain legal arguments which are essentially exceptions. In re Shirley Mae Smith, at 3-4, Docket No. 92-003-PA-R-S (November 9, 1993) (striking portions of statement

in support containing exceptions). Thus, the Commission grants the Motion to Strike and will not consider the Executive Director's Statement in Support or include it as part of the official record.

II. FINDINGS OF FACT

The Executive Director's Exceptions focused on the Conclusions of Law rather than the Findings of Fact. The Commission hereby adopts and incorporates the Proposed Findings of Fact in their entirety. The Commission also adopts in its entirety the procedural history of the case attached as Appendix A to the Recommended Decision.

III. CONCLUSIONS OF LAW

The Commission adopts Conclusion of Law A, that there is jurisdiction under Chapter 515 over Respondents Beretania Hale, Inc., and Le Cavelier. The Commission adopts Conclusion of Law B, 1, which sets forth the elements of a prima facie case for failure to make a reasonable accommodation and concludes in subsections a-c that the Executive Director presented a prima facie case. "After proof of a prima facie case, the burden of proof shifts to respondent to prove that it acted for its proffered legitimate non-discriminatory reasons." Tseu v. Treehouse Restaurant Inc., at 9, Docket No. 95-002-E-A-D-RET (May 2, 1996) (footnote omitted.)

Although Respondents were notified that Mrs. Ramos had requested a parking space as an accommodation for her disability, they did not engage her in an interactive process to discuss her request. Proposed Findings of Fact ("Fact") 24 and 25. The Recommended Decision sets forth the important policy reasons why

owners or persons engaging in a real estate transaction should participate in an interactive process with a disabled individual to explore the need for possible accommodations. One of the purposes of the interactive process is to encourage settlement of the accommodation issue and possibly avoid litigation. In this case, if Respondents had met with Mrs. Ramos and discussed the matter by clarifying the cooperative's unique method of allocating parking spaces the matter may have been settled without a complaint being filed.¹ The Commission adopts Conclusion of Law B, 1, d, that Respondents did not meet with Mrs. Ramos and refused to make the requested accommodation.

"Whether an accommodation is 'reasonable' is a question of fact determined by a close examination of the particular circumstances." Jankowski Lee & Associates v. Cisneros, 91 F.3d 891, 896 (7th Cir. 1996)(citation omitted.) The Recommended Decision carefully explored the "particular circumstances" of this case. With respect to both Respondents, the Hearings Examiner concluded that providing a parking space to Mrs. Ramos would cause an undue hardship or burden making the requested accommodation unreasonable. Le Cavelier owned five units with only one parking

¹Although Respondents claim that this case was brought unfairly, there is no basis for the criticism. It is clear that Respondents failed to engage Mrs. Ramos in an interactive process to determine a possible accommodation after she made the request. There was a good faith basis to claim that such failure constituted a discriminatory practice for which a minimum of \$500 in damages may be assessed under H.R.S. § 515-13(7). Also Respondents' defense of undue burden was not clearly established, and there was a good faith basis to claim that the accommodation sought by Mrs. Ramos was reasonable.

space.² The tenant using the space would not have given it up. Fact 21. The Recommended Decision concluded that Beretania Hale, Ltd., did not manage or control any parking spaces, however, it was not clear until the hearing that it had no control or management authority. The Executive Director claims that part of the common area could have been used for parking by obtaining a variance, especially in light of the fact that another tenant had been allowed to park in the area up until the time Mrs. Ramos made her request. The Recommended Decision concluded that City and County of Honolulu regulations would not have allowed parking in the area. Whether the City would have granted a variance because of Mrs. Ramos' disability will never be known because Beretania did not meet with her to explore this possibility. This underscores the importance of the interactive process. Although Beretania claims that obtaining a variance would be costly, some of the cost or burden to obtain the variance could have been borne by Mrs. Ramos which would have made the burden less onerous to Beretania and possibly make the requested accommodation reasonable. Under the circumstances, however, the Commission will adopt Conclusion of Law B, 1, e, that providing the accommodation would have caused an undue burden.

The Commission also adopts Conclusion of Law B, 2, that Respondents' failure to engage in the interactive process does not

²To help the Ramos family move in, Le Cavelier waived the July 1995 rent. Fact 14. After the loss of the parking space, she waived half of the May 1996 rent (for some plumbing work Mr. Ramos had done) and the entire June 1996 rent. Fact 26.

create per se liability under H.R.S. § 515-13(1). Although the policies underlying the interactive process are undermined by a party's failure to participate in the interactive process, the Commission agrees with the Recommended Decision that there is no per se liability in this particular housing case.³ The record supports the conclusion that providing a parking space to Mrs. Ramos would have imposed an undue burden upon Respondents.

Despite our decision in this case, owners or persons engaging in a real estate transaction should be cautious about not engaging in the interactive process in hopes that after a hearing the requested accommodation will be found to impose an undue burden. Failure to participate in the interactive process is prima facie proof that one may be acting in bad faith.⁴ See, Fjellestad v. Pizza Hut of America, Inc., 188 F.3d 944, 952 (8th Cir. 1999). Such bad faith may be used to establish an element of a party's failure to engage in an interactive process if "complainant could be reasonably accommodated but for the respondent's lack of good faith." Recommended Decision, at 30. "The interactive process would have little meaning if it was interpreted to allow [an owner], in the face of a request for accommodation, simply to sit

³Unlike our housing rules, the Commission's employment discrimination rules provide: "[t]o determine the appropriate reasonable accommodation, it shall be necessary for an employer or other covered entity to initiate an interactive process, after a request for an accommodation, with the qualified person with a disability in need of the accommodation." H.A.R. § 12-46-187(b).

⁴In addition, if there is a finding of bad faith it may be used to establish that a respondent's conduct was malicious, oppressive, or otherwise outrageous.

back passively, offer nothing, and then, in ... litigation, try to knock down every specific accommodation as too burdensome." Fjellestad, 188 F.3d at 953. Thus, rather than try to justify the failure to engage in an interactive process by proving that the accommodation would be an undue burden, owners and persons engaging in a real estate transaction should meet with the disabled tenant to discuss the requested accommodation and do so in good faith.

The Commission adopts Conclusion of Law B, 3, regarding harassment of Mr. and Mrs. Ramos, and Conclusion of Law C, on liability.

IV. EXECUTIVE DIRECTOR'S REQUEST TO ADD ROSE LEW AND FRANCIS TOM AS PARTIES

In the Exceptions, the Executive Director requests that, if the Commission affirms the Recommended Decision, Rose Lew and Francis Tom⁵ should be added as parties and the case remanded back for further proceedings. The request is denied because a motion to add new parties should be filed during the contested case. H.A.R. § 12-46-6.1.

IV. ORDER

The Commission adopts and affirms the Recommended Order that Respondents Beretania Hale, Ltd., and Mary Mau Le Cavelier did not violate H.R.S. § 515-3 and H.A.R. § 12-46-306 and dismisses the complaint.

⁵Tom owned several parking spaces and rented one to the Ramos family. Lew managed the parking spaces and told Tom to take back the space after arguments with Mrs. Ramos.

Dated: Honolulu, Hawaii

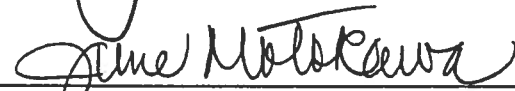
February 28, 2000


HARRY YEE, Chair


JACK LAW, Commissioner⁶


FAYE KENNEDY, Commissioner


ALLICYN HIKIDA TASAKA, Commissioner


JUNE MOTOKAWA, Commissioner

Notice: Under H.R.S. § 368-16(a), a complainant and a respondent shall have a right of appeal from a final order of the Commission by filing an appeal with the circuit court within thirty (30) days of service of an appealable order of the Commission.

⁶Prior to oral argument, Commissioner Law disclosed to counsel that he knew an individual who was not a party to the case but was a shareholder in Beretania Hale, Ltd. Commissioner Law stated that he would be able to decide the case impartially. The Chair decided that there would be no conflict of interest if Commissioner Law participated in the case.